No. 82-949

In the Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH WAYNE FRICKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of violating 18 U.S.C. 241 (conspiracy against rights of citizens) and 18 U.S.C. 242 (deprivation of rights under color of law). He was sentenced to 10 years' imprisonment for violating Section 241 and six months' imprisonment for violating Section 242, the sentences to be served concurrently. Petitioner contends that the district court incorrectly instructed the jury on the issue of criminal intent and improperly refused to allow him to call an Assistant United States Attorney as a witness on his behalf.

1. On February 25, 1979, petitioner, a narcotics agent with the Texas Department of Public Safety, severely beat Larry Michael Hintz. The beating occurred after an altercation between petitioner and Hintz at a dance hall in Wallis, Texas. Following Hintz's arrest at the dance hall, petitioner

and Wallis police officers Terry Joe Baldwin and Angel Salcido took Hintz in a patrol car to a remote area where petitioner brutally beat him. Hintz was handcuffed and intoxicated throughout the beating. The government also introduced evidence of an attempted cover-up of the incident (Pet. App. A-2, A-6).

Petitioner, Baldwin, and Salcido were charged with conspiring to violate Hintz's civil rights and with violating those rights. Subsequently Salcido's case was severed from that of the other defendants and he testified against them at trial. Petitioner and Baldwin were both convicted, and petitioner appealed (Pet. App. A-3).

The court of appeals affirmed (Pet. App. A-1 to A-15). It characterized the evidence against petitioner as "extremely strong, and * * * virtually uncontroverted in any of its essentials" (*id.* at A-3). It then ruled (*id.* at A-3 to A-6) that the district court's instruction that "a person ordinarily is presumed to intend all the natural and probable consequences of an act knowingly done," if error (*id.* at A-5 n.2), was harmless beyond a reasonable doubt. The court also held (*id.* at A-15) that the district court had not erred in refusing to allow petitioner to call an Assistant United States Attorney as a witness.[1]

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[1]The court of appeals further ruled that the government had not interfered with petitioner's right to call witnesses by informing the witnesses, during trial, that they were the subject of a grand jury investigation into the cover-up of the beating (Pet. App. A-6 to A-8); that the district court had not erred in excluding petitioner's counsel from an in camera inquiry into the validity of the witnesses' Fifth Amendment claims (*id.* at A-9 to A-11); that the district court had correctly concluded that the witnesses had valid Fifth Amendment claims extending to all questions relevant to the beating and cover-up (*id.* at A-12 to A-13); and that the prosecutor had not improperly commented on petitioner's failure to testify (*id.* at A-13 to A-15). Petitioner does not seek review of those rulings.

2. In instructing the jury on the element of specific intent, the district court charged, inter alia, that "a person ordinarily is presumed to intend all the natural and probable consequences of an act knowingly done" (Pet. App. A-4). Although his counsel did not object to this instruction at the time it was given (*id.* at A-5), petitioner now contends (Pet. 7-10) that the instruction runs afoul of this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). There is no merit to this claim.

a. In *Sandstrom*, a "deliberate homicide" case, the Court condemned the instruction, given over the defendant's objection, that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Court found the instruction improper because a reasonable jury could have interpreted the presumption either "as 'conclusive,' that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption" or "as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless *the defendant* proved the contrary * * *" (442 U.S. at 517; emphasis in original). Either interpretation, the Court held, had the impermissible effect of relieving the State of the burden of proving that the defendant had acted with the requisite criminal intent. *Id.* at 521-524.

Unlike the charge invalidated in *Sandstrom* (442 U.S. at 514-515; *id.* at 527 (Rehnquist, J., concurring)), the instruction petitioner challenges here could not reasonably have been interpreted as creating a mandatory presumption. The jury was told only that a person "*ordinarily*" is presumed to intend the natural and probable consequences of his acts (Pet. App. A-4; emphasis by the court of appeals).[2] At the

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[2]As the court of appeals noted (Pet. App. A-5 n.2; emphasis in original), "the expression '*the law* presumes,' with its especially coercive connotations, [was] not employed."

same time, the jurors were instructed that if they found that petitioner knew what he was doing and intended to do what he did, they "*may* conclude" that he acted with the requisite specific intent (Pet. App. A-4; emphasis added). They were also informed that they were entitled to consider all of the attendant circumstances in determining whether petitioner acted with specific intent (*ibid.*). In these circumstances, a reasonable juror could not have construed the court's instruction as a directive to find that petitioner acted with specific intent. In addition, immediately following the "ordinarily is presumed" language, the jury was specifically instructed that the burden of proving each element of the offense remained with the government (*ibid.*). In light of this explicit statement, no reasonable juror could have interpreted the court's charge as shifting the burden of persuasion to petitioner. Since the instruction in this case "allowed but did not require the jury to draw conclusions about [petitioner's] intent from his actions" (*Sandstrom, supra,* 442 U.S. at 514), it was proper. See *id.* at 527 (Rehnquist, J., concurring); see also *id.* at 514-515.[3]

b. Even if the instruction was improper, the court of appeals correctly held (Pet. App. A-5 to A-6) that the error was harmless beyond a reasonable doubt. The court noted (*id.* at A-6) that the government's evidence showed that petitioner transported Hintz to a remote area for the purpose of beating him, asked other officers to help him, and

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[3]In any event, no timely objection was made to this instruction, as is required by Fed. R. Crim. P. 30 ("[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection"). Accordingly, in the absence of plain error, the court of appeals correctly affirmed the judgment of the district court. See *Singer* v. *United States,* 380 U.S. 24, 38 (1965).

beat Hintz severely while Hintz was handcuffed and intoxicated. *Ibid.* Petitioner's only defense was that no beating took place. *Ibid.* As the court of appeals correctly observed (*ibid.*), "[u]nder these circumstances, if a jury concluded that a beating took place, it would undoubtedly encompass a finding that [petitioner] had the requisite intent." Accordingly, any error in the district court's charge was harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18 (1967).[4]

3. Petitioner also contends (Pet. 16-21) that the district court erred in sustaining the government's objection to his calling Assistant United States Attorney Carl Walker as a witness. Petitioner asserts (*id.* at 16-17) that his purpose in calling Walker was to have him testify that petitioner had been testifying as a government witness before a federal grand jury at a time when, according to a government witness in this case, petitioner was attending a meeting at which a cover-up of the beating was discussed. The district court ruled that Walker was not required to testify because

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[4]Petitioner suggests (Pet. 10-15) that this Court grant the petition in order to adopt a rule that a presumptive instruction concerning an essential element of a criminal offense can never constitute harmless error. This suggestion should be rejected. Where, as here, the government's evidence in support of an essential element of the offense is "extremely strong" and "virtually uncontroverted" (Pet. App. A-3), an error in the trial judge's instructions concerning that element should not automatically lead to reversal. Cf. *Glasser* v. *United States*, 315 U.S. 60, 67 (1942). The instruction condemned in *Sandstrom* does not violate a constitutional right so basic to a fair trial — such as the right to counsel or an impartial judge — that it can never be considered harmless error. See *Chapman* v. *California*, *supra*, 386 U.S. at 23 & n.8. As the Fifth Circuit held in *United States* v. *Chiantese*, 560 F.2d 1244, 1255 (1977) (en banc), cert. denied, 441 U.S. 922 (1979), instructions of the kind invalidated in *Sandstrom* are not "the type of error which will automatically produce reversal"; rather, "the weighing of its harm to the accused [is] a judicial matter to be resolved in the context of each case where it occurs."

petitioner had not complied with Department of Justice regulations, 28 C.F.R. 16.21 *et seq.*, requiring the prior approval of the Attorney General or an appropriate Justice Department official before a Department employee may disclose information obtained in the performance of his official duties (Pet. App. A-15).

The court of appeals affirmed on a different ground (Pet. App. A-15). It noted (*ibid.*) that counsel for petitioner as well as government counsel had represented to the trial court that Walker had stated that he did not remember where petitioner was at the time in question. It therefore concluded that "[t]he desired testimony was indecisive, non-exculpatory, and concerned an occurrence long *after* the beating" (*ibid.*; emphasis in original).[5] The court of appeals correctly held that there was nothing improper in the district court's refusal to permit petitioner to call Walker as a witness.[6]

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[5]Contrary to petitioner's suggestion (Pet. 17), the fact that Walker could not remember where petitioner was at the crucial time renders his testimony of no value not only in actually establishing petitioner's whereabouts at that time, but also in impeaching the government witness who testified that petitioner was at a cover-up meeting at the time in question.

[6]Petitioner urges the Court (Pet. 21) to grant the petition in order to determine the constitutionality of the Department of Justice regulations upon which the district court based its decision. In view of the court of appeals' affirmance of the district court's ruling on an alternative ground that itself does not warrant review by this Court, the petition should not be granted to consider this constitutional question. Cf. *Ashwander* v. *TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring). Moreover, even petitioner's own authority contemplates a defendant's compliance with the procedures required by the regulations and the government's subsequent refusal to provide testimony as predicates to a constitutional challenge. See *United States* v. *Feeney*, 501 F. Supp. 1337, 1340 (D. Colo. 1980), remanded, *United States* v. *Winner*, 641 F.2d 825 (10th Cir. 1981); see also *United States* v. *Allen*, 554 F.2d 398, 406-407 (10th Cir. 1977). Petitioner has cited no authority for his

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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claim (Pet. 18) that requiring him to comply with the regulations as a prerequisite for the government's testimony violates his constitutional rights. In any event, the regulations are a proper exercise of the Attorney General's authority. See *Touhy* v. *Ragen*, 340 U.S. 462 (1951); *United States* v. *Allen*, *supra*, 554 F.2d at 406-407.

DOJ-1983-02